No. 96-1389

In The

Supreme Court of the United States

October Term, 1996

B.C. FOREMAN, IDA CLARK, OTIS TARVER, DOMINIC DE LA CRUZ, LOUIS DAVIS, and MANDY PESINA,

Appellants,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, Dallas County Judge; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, and KENNETH MAYFIELD, Dallas County Commissioners; and BRUCE SHERBET, Elections Administrator of Dallas County, Texas,

Appellees.

On Appeal From The United States District Court For The Northern District Of Texas

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Contrary to the impression appellees attempt to create, this is a simple case. Virtually all the relevant facts were stipulated. App. 11a-17a. It is undisputed that: (1) dating back at least to 1983, appellees enacted or administered a series of changes in the standards for selecting and appointing election judges in Dallas County; and (2) none of those changes was precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See* Motion to Affirm at i, 1-7 [hereinafter Mot.]. The District Court's decision denying injunctive relief is less than four pages long. App. 1a-4a. It neither quotes the relevant statutory text nor cites a single case interpreting that text – perhaps because its holding conflicts with Congress's clearly expressed intent and with every Section 5 coverage case ever decided by this Court.

Against this backdrop, it is not surprising that appellees devote 25 pages to muddying the waters. They do this, first, by ignoring the express terms of the statute, which clearly mandate preclearance of changes in "any . . . standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c, and, second, by proposing a novel interpretation of Section 5 that would discourage compliance with, and ultimately eviscerate, the Act.

I. APPELLEES IGNORE THE STATUTORY TEXT REQUIRING PRECLEARANCE FOR "ANY" CHANGE IN A "STANDARD, PRACTICE, OR PROCEDURE WITH RESPECT TO VOTING."

Appellees are simply wrong to suggest that the changes at issue here did not involve any "standard, practice, or procedure with respect to voting" within the meaning of Section 5. 42 U.S.C. § 1973c. Indeed, they cannot even pinpoint the part of the above-quoted

language that supposedly is too narrow to encompass those changes.

A. *"With respect to voting"* – There can be no doubt that any change in a standard, practice, or procedure regarding "election judges" in Texas would be a change "with respect to voting" as that term is used in Section 5. Appellees effectively concede this point. *See* Mot. at 7 ("the statute creating the position of election judge is an election procedure requiring section 5 preclearance").

Yet the *only* case appellees cite in which this Court (or any other court) held that a change fell outside Section 5's scope, *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), was a case interpreting the statute's "with respect to voting" language. *Id.* at 494. In *Presley*, this Court refused to require Section 5 preclearance of changes that reallocated decisionmaking authority among certain elected county officials, largely because such a requirement would subject to federal scrutiny local governments' routine internal operations (most of which bear no direct relationship to voting) and thus "would work an unconstrained expansion of [Section 5's] coverage." *Id.* at 503-04, 506, 510.

Appellees attempt to make a similar argument here, claiming that appellants' interpretation of the Act would open virtually all state and local governmental appointments to Section 5 challenges, which in turn would raise serious constitutional concerns. Mot. at 12-13. That claim is a red herring. The method of selecting and appointing Dallas County's election judges is covered by Section 5 solely because they are *election* judges. Their jobs bear an obvious and "direct relation to voting and the election process." *Presley*, 502 U.S. at 503; *see* J.S. 2-3, 16 (describing election judges' duties); *cf. Harris v. Graddick*, 593 F. Supp. 128, 132 (M.D. Ala. 1984) (holding that appointment of election officials is a "standard, practice, or procedure" under Section 2 of the Act, 42 U.S.C. § 1973). By contrast, the vast majority of governmental appointees lack any direct tie to "voting and the election process" and therefore fall clearly outside the plain text of Section 5.

Thus, appellees' constitutional concerns are entirely misplaced.

B. *"Standard, practice, or procedure"* – Thus, the real question presented here is whether the contested changes were changes in a *"standard, practice, or procedure* with respect to voting." 42 U.S.C. § 1973c (emphasis added). Appellees – again ignoring the statute's plain language – have devised three principal lines of argument. None can withstand scrutiny.

1. Appellees suggest that the County's various methods for selecting election judges are not standards, practices, or procedures because they could be "rescinded" or "abandoned" at any time by a simple majority vote of the Commissioners Court. *See* Mot. at 11. Of course, the same could be said of *any* state or local enactment covered by Section 5. Absent some constitutional restraint, legislative bodies are *always* free to rescind or abandon previously enacted laws. If appellees' argument were correct, Section 5 would cover nothing.

2. Appellees argue that each of the changes challenged here was merely "a statement of internal operating policy" or a voluntary guideline that the Commissioners Court set for itself, and hence lacks the gravity of a "standard, practice, or procedure." Mot. at 8-12. In appellees' view, these guidelines are more akin to the decision whether to reappoint a particular individual as an election judge, a decision that clearly would fall outside Section 5's scope. *Id.* at 7-8, 10 & n.3.

That argument is belied, however, by the County's own description of its methods for choosing election judges. In its brief, *id.* at i, 1-6, 10, 24, the County refers to one or more of its various approaches as a "formula," a "method," a "specific methodology," and even a "standard" – the very term Congress adopted in drafting Section 5. And the contemporaneous documents – the

Commissioners Court's 1995 and 1996 orders – expressly refer to the methods for choosing election judges as "policies or practices" or as "policies and procedures." App. 22a, 32a. At bottom, then, appellees ask this Court to hold that each of their (self-described) "standards," "policies," "practices," and "procedures" somehow fails to qualify as a "standard, practice, or procedure" under Section 5. If their argument is correct, then we surely reside in "an Alice-in-Wonderland world where words have no meaning." *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring).

Appellees counter that at least one of the County's policies or practices was not reduced to writing. Mot. at 4, 10. But the 1995 and 1996 practices challenged here were enacted as formal, written orders of the Commissioners Court. App. 22a-32a. In any event, Section 5 "reaches informal as well as formal changes." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985); *see also NAACP, DeKalb County Chapter v. Georgia*, 494 F. Supp. 668, 676-77 (N.D. Ga. 1980) (Section 5 is triggered when a county replaces a "confused" voting practice with a "consistent[ly]" applied one).

Appellees also claim that the various policies and practices adopted in 1983, 1995, and 1996 were just single "factors" in multi-factor sets of articulated and unarticulated criteria for choosing election judges. *See* Mot. at 4-13. But there is not a stitch of evidence in the record below suggesting that the commissioners ever deviated from the methods described in the briefs, *see* J.S. 2-9; Mot. at 2-7. Appellees' point is purely conjectural and hence should carry no weight. *See Georgia v. United States*, 411 U.S. 526, 531 (1973) (Section 5 is concerned "with the reality of changed practices as they affect [minority] voters").

3. Appellees contend that application of Section 5 – a statute designed to combat *racial* discrimination in voting – does not apply here because the Commissioners

Court merely responded to changes in the County electorate's *partisan* balance; and they accuse appellants of attempting "to bring purely partisan determinations within the scope of the Voting Rights Act." Mot. at 12. The District Court adopted essentially the same argument. *See* App. 3a-4a. It is wrong, for three reasons.

First, questions concerning the commissioners' actual *purpose* or *motive* in enacting the various changes, *see* Mot. at 8-13; App. 3a-4a, are exclusively reserved to the Attorney General in the administrative preclearance process, or to the District Court for the District of Columbia in a *substantive discrimination* declaratory-judgment action, and should play no role in a Section 5 *coverage* case. This Court has not hesitated to reverse the judgments of district courts that failed to heed that distinction. *See, e.g., Lopez v. Monterey County*, 117 S. Ct. 340, 348-49 (1996); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642, 646-47 (1977) (*per curiam*); *Connor v. Waller*, 421 U.S. 656, 656 (1975) (*per curiam*); *Perkins v. Matthews*, 400 U.S. 379, 385-86 (1971); *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 n.19, 558-59 (1969). What matters here is that the various methods for selecting election judges reflect the Dallas County Commissioners' discretionary policy choices, which have at least the *potential* for racial discrimination and therefore should be evaluated by the appropriate federal authorities in Washington. *Young v. Fordice*, No. 95-2031, slip op. at 10-12 (U.S. Mar. 31, 1997); *Lopez*, 117 S. Ct. at 348-49.

Second, appellees' argument would lead to absurd results. If it is the partisan nature of the County's methods for selecting election judges that saves them from Section 5's preclearance requirement, then *purely* "procedural" changes that make no reference to party – *e.g.*, requiring the commissioners to approve election-judge appointments by unanimous vote, or by simple-majority vote – would certainly fall within Section 5, while "substantive" changes like those challenged here (which effectively rendered all Democrats ineligible to

serve as election judges) would fall outside Section 5. In Dallas County, where most whites vote Republican and where, as a plurality of this Court recently recognized, there is "evidence that 97% of African-American voters . . . vote Democrat," *Bush v. Vera*, 116 S. Ct. 1941, 1956 (1996), such a result would be bizarre. Allegedly "partisan" changes – despite being rife with potential for racial discrimination – would not be subject to preclearance, while strictly procedural changes would be. That cannot be Congress's intent. *See Presley*, 502 U.S. at 505 (Congress mandated preclearance for every change with respect to voting that has even the "potential for [racial] discrimination"); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 42 (1978) (same).

Third, appellees, following the District Court's reasoning, assert that appellants would use Section 5 to "freeze the partisan choices" of Dallas County voters. App. 3a. In fact, that charge is more properly aimed at appellees. The Presidential precinct method used from 1983 to 1995 – which appellants support in substance – fully allowed for partisan shifts. For example, in the mid-1980s, Republican election judges replaced Democrats in all precincts that had voted for President Carter in 1980 but for President Reagan in 1984. It is the appellees' 1996 methods that have effectively insulated the selection process from the ebb and flow of partisan tides by eliminating every single Democratic election judge. Hence, appellees' claim to be the champions of free competition between the political parties rings hollow.

II. APPELLEES' ALTERNATIVE ARGUMENT WOULD DISCOURAGE COMPLIANCE WITH, AND THEREBY EVISCERATE, SECTION 5.

Appellees advance an alternative argument that was raised in, but not addressed by, the District Court: Even if the method for selecting and appointing election judges *is* a "standard, practice, or procedure with respect to voting" and therefore subject to Section 5's preclearance

requirements, the County is always free to abandon an unprecleared (and hence legally unenforceable) method and to reinstate the most recent precleared method. Mot. at 14-19. Here, the parties have stipulated that no method was ever precleared, App. 15a, so the most recent method that is legally enforceable under Section 5 would be "that in force or effect on November 1, 1972," the "coverage date" that applies to Texas and its counties. 42 U.S.C. § 1973c; *see* Mot. at 14-16, 24-25. Thus, appellees contend that their October 1996 decision to return to the method allegedly in effect in 1972 need not be precleared, regardless of its potential for racial discrimination. They are wrong, for three reasons.

First, the County's novel approach would "open[ ] a loophole in the statute the size of a mountain." *Morse v. Republican Party*, 116 S. Ct. 1186, 1213 (1996) (Breyer, J., concurring in the judgment); *see also NAACP, DeKalb County*, 494 F. Supp. at 677. Under appellees' theory, a county that had submitted each of its previous changes for Section 5 review would be barred from returning to a discriminatory policy or practice, as Congress intended. But a neighboring county that had consistently flouted Section 5 by *never* seeking preclearance would be at liberty to return to the voting standards, practices, and procedures that were in effect on the relevant coverage date (November 1, 1972 in Texas; November 1, 1964 in the Deep South, *see* 28 C.F.R. pt. 51, App. (1996)). The law-abiding county would be subject to federal review, while the law-breaking county could revert to practices from the Jim Crow era. Such a perverse result, rewarding local governments that intentionally evade the Voting Rights Act, cannot possibly reflect Congress's intent. Yet that result is precisely what Dallas County asks this Court to condone.

Second, appellees' argument flies in the face of the statute's plain text, as most recently interpreted in *Young v. Fordice, supra*. *Young* held that a voting-related change is covered by Section 5 if the new practice or procedure differs significantly from the one that previously was *in*

fact " 'in force or effect.' " *Id.*, slip op. at 8-13 (quoting Section 5). Whether the previous baseline practice or procedure was precleared (or legally enforceable) is simply irrelevant to the inquiry. *See id.* at 8-10; *see also Lopez*, 117 S. Ct. at 348. Here, it is undisputed that the 1983 method was in effect for twelve years; hence it became part of the baseline for judging whether the 1995 change was covered by Section 5. And it is undisputed that the 1995 method was in effect for a full year; hence it became part of the baseline for judging the 1996 change. Similarly, Dallas County must seek preclearance of the current (October 1996) method simply because it is different from the method previously in force and effect – regardless of whether that previous method had been precleared. *See Young*, slip op. at 8-13; *see also* 28 C.F.R. § 51.12 (1996) ("Any change affecting voting, even though it . . . returns to a prior practice or procedure, . . . must meet the section 5 preclearance requirement.").[1]

Third, even if appellees' legal argument was not so manifestly wrong as a matter of text, precedent, and policy, it would fail on the facts of this case. Contrary to appellees' brief, Mot. at 2, appellants' amended complaint challenged the County's failure to preclear *all four* changes (*i.e.*, the 1983, 1995, and September 1996 – as well as the October 1996 – changes). Because it is undisputed that each of those four methods is different from one another, *see* J.S. 2-9; Mot. at 2-7, at least three must be "different from [the method] in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Even if the Court accepted the County's assertion that the October 1996 and November 1972 methods are in fact identical – an assertion that,

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[1] Appellees go astray, Mot. at 14-19, 24-25, by repeatedly confusing the concept of "baselines" in coverage cases, *see Young*, slip op. at 8-10; 28 C.F.R. § 51.12 (1996), with the entirely distinct concept of "benchmarks" in substantive-discrimination cases, *see Young*, slip op. at 16; 28 C.F.R. § 51.54(b) (1996). Benchmarks must be legally enforceable under Section 5; baselines need not be.

as appellees concede, Mot. at 4, 23-25, is unsupported by the record evidence[2] – the other three changes challenged here obviously *cannot* be identical to the November 1972 method and therefore the failure to have them precleared must violate Section 5.

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[2] Citing no authority, appellees also assert that "appellants had the burden" of proving the method in force or effect on November 1, 1972. Mot. at 25. That assertion is incorrect. Congress designed Section 5 to "shift[ ] 'the advantage of time and inertia' to the potential victims of [racial] discrimination." *Young*, slip op. at 12 (citation omitted); *cf. McCain v. Lybrand*, 465 U.S. 236, 249, 255-57 (1984) (burden is on the State to submit a complete and unambiguous description of proposed changes). Moreover, plaintiffs shoulder no burden of proof when appealing from a Rule 12(b)(6) dismissal for failure to state a claim. App. 66a. (Similarly, appellees offer three "corrections" to the statement of the case, Mot. at 1-2, that are both factually inaccurate and irrelevant on appeal from a judgment of dismissal.)

CONCLUSION

Accordingly, this Court should summarily reverse the judgment of the District Court or, alternatively, note probable jurisdiction.

Respectfully submitted,

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